

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

FREDERICK DOUGLAS BURTON

CRIMINAL  
NO. 16-0028

**MEMORANDUM**

**SCHMEHL, J.**

**JULY 12, 2017**

Following the trial and guilty verdict, Defendant Burton moves this court for a judgment of acquittal under Federal Rule of Criminal Procedure 29, or in the alternative, for a new trial under Federal Rule of Criminal Procedure 33. Burton raises two arguments: 1) the Government constructively amended the indictment; and 2) the Government provided insufficient evidence to support a conviction. (ECF Docket No. 55.) This Court rejects Burton's arguments and denies the motion.

**I. ANALYSIS**

Under Federal Rule of Criminal Procedure Rule 29, the court may set aside a guilty verdict and enter a judgment of acquittal. Fed. R. Crim. P. 29(c)(2). For this purpose, the court must view the evidence in the light most favorable to the prosecution and must uphold the verdict if any reasonable trier of fact could have found guilt beyond a reasonable doubt given the evidence presented at trial. *United States v. Smith*, 2016 WL 8716254, at \*3 (E.D.Pa. 2016). Therefore, the Government's evidence must have been sufficient to convict. *Id.* As the Third Circuit and this Court have stated, Rule 29 applies a highly deferential standard; thus, challenges to the sufficiency of evidence

presented should be “confined to cases where the prosecution’s failure is clear.” *Id.* (citing *United States v. Carbo*, 572 F.3d 112, 119 (3d Cir. 2009)).

Federal Rule of Criminal Procedure Rule 33 allows the court to vacate any judgment and grant a new trial if substantial prejudice has occurred and the interest of justice so requires. Fed. R. Crim. P. 33. This Court has stated, “[t]o order a new trial on the ground that the jury’s verdict is contrary to the weight of evidence, the Court must determine ‘that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.’” *United States v. Bado*, 2017 WL 2362401, at \*2 (E.D.Pa. 2017) (citing *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). Unlike a Rule 29 motion where the court views the evidence in the light most favorable to the prosecution, the court in a Rule 33 motion “does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government’s case.” *Id.*

#### **A. Constructive Amendment**

First, Burton argues the Government constructively amended the indictment, altering the Government’s burden, and “advanced the proposition that the Government had no duty to prove the identity of the intended victim of the alleged scheme, [the Social Security Administration].” A constructive amendment to an indictment occurs “where a defendant is deprived of his ‘substantial right to be tried only on charges presented in an indictment returned by a grand jury.’” (ECF Docket No. 61, at 8.) Burton argues the constructive amendment prejudiced his case and altered his defense when this Court allowed the Government to “modify” its jury instructions before deliberations. Burton

claims “[he] was denied the opportunity to cross-examine on certain issues had it known of the Government’s broader theory of prosecution.” (ECF Docket No. 55, at 4.)

Burton continues, because the indictment identified the Social Security Administration (“SSA”) as the intended fraud victim, the Government was required to prove Burton in fact knew the SSA was the intended victim. In support of this argument, Burton cites the Third Circuit and claims “the identity of the intended victim is an essential fact because it implicates the nature of the scheme, method of preparation, evidence required, and preparation of a defense.” (ECF Docket No. 55, at 6) (citing *U.S. v. Dreer*, 457 F.2d 31, 33 (3d Cir. 1972)). However, Burton reliance on *Dreer* is misguided. The Third Circuit in *Dreer* concluded the Government is not required to identify the intended fraud victim(s) under mail fraud because the crime is committed against the United States by use of its mails, and therefore, “the persons communicated with through the mails are only important to identify and show the scheme.” *Dreer*, 457 F.2d at 33. As the Government correctly asserts, “If a defendant were indicted for committing a fraud, as opposed to mail fraud, then ‘it would be necessary to name the persons defrauded.’” (ECF Docket No. 61) (citing *Dreer*, 457 F.2d at 33).

Here, the indictment returned by the grand jury against Burton alleged that from November 13, 2013, until around December 12, 2013, Burton “devised and intended to devise and execute, and aided and abetted the devising and execution of, a scheme to defraud the Social Security Administration, and to obtain money and property by means of false and fraudulent pretenses, representations and promises.” (ECF Docket No. 61, at 8) (citing ECF Docket No. 1, at 2 ¶8). The indictment included references to Burton’s signed letters containing false statements relating to the fraudulent scheme. (Id. at 3 ¶11.)

Burton's argument that his counsel would have employed a different trial strategy had it known that the Government was not required to prove Burton knew the identity of the fraud victim, does not rise to the level where this Court could find that such a miscarriage of justice occurred to the extent where the Court would need to grant a new trial or enter a judgment of acquittal. As the Third Circuit concluded, "[c]onvictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused." *Dreer*, 457 F.2d at 33. Therefore, granting Rule 29 or Rule 33 relief because a "constructive amendment" was granted, would be improper.

### **B. Sufficient Evidence**

Second, Burton argues the Government failed to present sufficient evidence to support any of the elements of the charges against him and that no reasonable juror could have found him guilty. (ECF Docket No. 55, at 7.) Burton maintains the Government did not establish the foregoing elements beyond a reasonable doubt: "1) the existence of a scheme to defraud; 2) the use of mails, or carrier, in furtherance of the fraudulent scheme; or 3) Dr. Burton's culpable participation." (Id.) Again, Burton argues the Government did not prove Burton knew the identity of the victim. (Id. at 8.) Burton also argues the Government failed to prove Burton intended to participate in the fraudulent scheme or that he made false statements in the letters because he did not believe the statements to be false at the time he made them. (Id. at 9.) And finally, Burton argues the Government did not prove beyond a reasonable doubt that he used the mails in furtherance of the crime.

In assessing the Government's case, as is required under Rule 33, this Court does not find that a miscarriage of justice occurred in light of Defendant's arguments. The

evidence presented by the Government at trial – Burton’s own statements to FBI Special Agent Kurt Kuechler and the grand jury; letters Burton signed with his letterhead on behalf of Von Kiel that contained the Postal addresses of both Jeffrey M. Miller and Krasno, Krasno, and Onwudinjo in the header; testimony from Jeffrey M. Miller, Esq. and Krasno attorney Steve Shamberg relating to the letters mailed and/or received – was sufficient for the jury to convict. Thus, the jury’s verdict was not contrary to the weight of the evidence and this Court finds no reason to grant Rule 29 or Rule 33 in favor of Defendant.

## **II. CONCLUSION**

Accordingly, the Court denies Burton’s post-verdict motion for a judgment of acquittal or new trial under Rule 29 and Rule 33, respectively. The motion is denied by the accompanying order and the Defendant shall be scheduled for sentencing.

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**ORDER**

**AND NOW**, this 12<sup>th</sup> day of July, 2017, upon consideration of Defendant's post-trial Motion for Judgment of Acquittal under Rule 29 or Motion for New Trial under Rule 33 (Docket No. 46), oral argument, and all supporting and opposing papers, and for the reasons stated in the accompanying memorandum opinion, it is hereby **ORDERED** that Defendant Burton's Motion for Judgment of Acquittal or New Trial is hereby **DENIED**.

**BY THE COURT:**

/s/ JEFFREY L. SCHMEHL, J.  
Jeffrey L. Schmehl, J.